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IN THE COURT OF APPEALS OF INDIANA

THE UNIFORM HOUSE, INC.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A05-0512-CV-748
	)	
SCRUBS TO GO, INC.,	)	
SCRUBS ON WHEELS, INC., JEFF	)	
BUTLER AND MARTIN TAYLOR,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Caryl Dill, Judge
Cause No. 49D01-0207-PL-001236

January 11, 2007

VAIDIK, Judge

Case Summary

The Uniform House, Inc. ("UH") appeals the trial court's grant of summary judgment in favor of Scrubs to Go, Inc. ("STG"), Scrubs on Wheels, Inc. ("SOW"), Jeff Butler ("Butler"), Thomas DeCocker ("DeCocker"), and Martin Taylor ("Taylor") (collectively "Defendants") on UH's claims for breach of contract, misappropriation of trade secrets, tortious interference with business relationships, conversion, and unfair competition. Regarding UH's claim for breach of contract, we find that the restrictive covenant which forms the basis of that claim is overbroad and unenforceable. Furthermore, the restrictive covenant cannot be cured by application of the blue pencil doctrine because it is not clearly separated into divisible parts. As to UH's claim for misappropriation of trade secrets, we conclude that none of the information allegedly misappropriated by Defendants constitutes trade secrets. Finally, we find no error in the trial court's grant of summary judgment in favor of Defendants on UH's claims for tortious interference with business relationships, conversion, and unfair competition. We therefore affirm the trial court's grant of summary judgment in favor of Defendants on all of UH's claims.

Facts and Procedural History

UH is a "mobile uniform company" in the business of selling vocational uniforms to individuals employed in public safety, restaurant and food service, nursing, and medicine. In approximately 1994, UH began making sales from mobile units. One of the units consists of a goose-neck trailer pulled by a pickup. The units travel to facilities, where customers come aboard and make purchases.

On August 1, 1997, UH hired Taylor as a sales consultant. Taylor signed an employment agreement ("Employment Agreement"), paragraph 2 of which is a "Restrictive Covenant." Appellant's Amended App. p. 151. Sub-paragraph 2.b of the Restrictive Covenant provides:

> Employee acknowledges that during the course of his employment with the Employer, he will become acquainted with confidential information of the Employer and that he will form close, advantageous business relationships with the Employer's customers. Employee acknowledges that the Employer's confidential information and business relationships with their customers constitute valuable property of the Employer, and the Employee acknowledges that the Employer's confidential information could be advantageous to such Employer's competitors. Therefore, the Employee agrees that he will not, during his Employment by the Employer, and for a period of eighteen (18) months thereafter, directly or indirectly, whether as a proprietor, officer, director, trustee, employee, agent, consultant, or advisor, directly or indirectly, own, manage, operate, control or participate in the ownership, management, operation or control of, or be connected in any manner with, any business which shall be in competition with the type of business engaged in by the Employer at the time of the Employee's termination of his employment with the Employer. For the same eighteen (18) month period, Employee shall not, directly or indirectly, solicit the business of, or engage in business with, any persons, partnerships, corporations or other entities that were customers of the Employer any time during the last twelve (12) months of the Employee's employment with the Employer.

Id. Prior to and during Taylor's employment with UH, it had no formal reporting or compilation process for purposes of keeping updated status reports on established accounts or newly generated business. UH did not regularly compile or summarize any sales information to distribute to its salespeople to keep them advised of their customers and their customers' requirements.

During the course of Taylor's employment with UH, he became acquainted with Paul Haber ("Haber") of Cherokee/Strategic Partners, a supplier of medical uniforms and accessories. Haber introduced Taylor to Butler and DeCocker. In June 2001, Taylor began discussing with DeCocker the possibility of employment with a new medical uniform company owned by DeCocker. Taylor reached an agreement with DeCocker regarding employment with this new company, then terminated his employment with UH on August 20, 2001. SOW was formed shortly after Taylor left UH and is an Indiana corporation owned by Butler, DeCocker, and Taylor. SOW is essentially in the same business as UH, that is, selling medical uniforms, and it does business in, among other places, Taylor's former UH sales territories. On September 1, 2001, Taylor signed an employment agreement with SOW and became Vice President of Sales and Operations. After Taylor joined SOW, SOW purchased a pickup and trailer combination similar to the one used by UH, and Taylor negotiated the purchase of another mobile sales vehicle from a company with which UH had done business.

Butler and DeCocker also own STG, which is essentially in the same business as both UH and SOW. SOW and STG share the same address and phone number. SOW selects, purchases, and warehouses enough inventory for itself and STG, and it sells the inventory to STG at no markup. STG is a competitor of UH and has sold medical scrubs to many customers that were customers of UH during the last twelve months of Taylor's employment with UH. Taylor is neither an employee nor an owner of STG.

On February 3, 2003, UH filed an Amended Complaint against Taylor, STG, SOW, Butler, and DeCocker alleging: (1) breach of contract by Taylor; (2)

misappropriation of trade secrets; (3) conversion; (4) tortious interference with business relationships; (5) unfair competition; (6) an accounting; and (7) injunctive relief. UH then filed a motion for partial summary judgment, asking the trial court to enter final judgment in its favor on the issue of liability and to set a hearing on the issue of damages. SOW, Butler, and Taylor responded with their own motion for summary judgment, as did STG. On November 29, 2005, the trial court issued its Findings of Fact and Conclusions of Law and Entry of Summary Judgment. The trial court denied UH's motion for summary judgment, granted Defendants' motions, and entered judgment in favor of the Defendants on all counts in UH's Amended Complaint. UH now appeals.

Discussion and Decision

On appeal, UH argues that the trial court erred in granting summary judgment in favor of the Defendants on its claims for breach of contract, misappropriation of trade secrets, conversion, tortious interference with business relationships, conversion, and unfair competition. Normally, when parties make cross-motions for summary judgment, each motion must be considered separately. *Keaton & Keaton v. Keaton*, 842 N.E.2d 816, 819 (Ind. 2006). Here, however, UH does not challenge the trial court's denial of its motion for summary judgment. As such, we will only review the trial court's grant of the Defendants' motions.

In determining whether a grant of summary judgment was proper, we apply the same standard used by the trial court, that is, whether the evidence shows that there is no genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Midtown Chiropractic v. Ill. Farmers Ins. Co.*, 847 N.E.2d 942, 944 (Ind.

2006); *see also* Ind. Trial Rule 56(C). All facts and reasonable inferences from them are construed in favor of the non-moving party, and all doubts as to the existence of genuine issues of material fact must be resolved against the moving party. *Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 909 (Ind. 2001). If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. *Id*. We address each of UH's claims for relief in turn.

I. Breach of Contract[1]

UH first argues that the trial court erred in granting summary judgment in favor of Taylor on UH's claim for breach of contract. UH's breach of contract claim was based on Taylor's alleged violation of the Restrictive Covenant in the parties' Employment Agreement. In granting summary judgment in favor of Taylor on this claim, the trial court did not reach the issue of whether Taylor violated the Restrictive Covenant, as it found that the Restrictive Covenant is overbroad and unenforceable. On appeal, UH does not challenge the trial court's conclusion that the Restrictive Covenant, as originally written, is unenforceable. Rather, UH contends that the trial court erred in refusing to apply the "blue pencil doctrine" in order to cure the flaws in the Restrictive Covenant. We cannot agree.

We begin our discussion with a summary of the blue pencil doctrine. If a court finds that portions of a noncompetition agreement or a covenant not to compete are unreasonable, it may not create a reasonable restriction under the guise of interpretation, since this would subject the parties to an agreement they have not made. *Burk v.*

[1] As Defendants correctly note, UH's claim for breach of contract applies to Taylor only, as there was no contract between UH and the other Defendants: SOW, STG, Butler, and DeCocker.

Heritage Food Servs. Equip., Inc., 737 N.E.2d 803, 811 (Ind. Ct. App. 2000). However, if such a covenant is clearly divisible into parts, and some parts are reasonable while others are unreasonable, a court may enforce the reasonable portions only. *Id*. This process of striking unreasonable provisions from a covenant is known as "blue-penciling." *Id*. "When applying the blue pencil, a court must not add terms that were not originally part of the agreement." *Id*. "Rather, 'unreasonable restraints are rendered reasonable by scratching out any offensive clauses to give effect to the parties intentions.'" *Id*. (quoting *Smart Corp. v. Grider*, 650 N.E.2d 80, 84 (Ind. Ct. App. 1995), *reh'g denied*, *trans. denied*).

The trial court found the Restrictive Covenant to be overbroad and unenforceable because it prohibited Taylor "from working for any competitor of [UH] in any capacity." Appellant's Amended App. p. 33 (Conclusion of Law 15). More specifically, sub-paragraph 2.b provides, in pertinent part:

> [T]he Employee agrees that he will not, during his Employment by the Employer, and for a period of eighteen (18) months thereafter, directly or indirectly, whether as a proprietor, officer, director, trustee, employee, agent, consultant, or advisor, directly or indirectly, own, manage, operate, control or participate in the ownership, management, operation or control of, or be connected in any manner with, any business which shall be in competition with the type of business engaged in by the Employer at the time of the Employee's termination of his employment with the Employer.

Id. at 151 (sub-paragraph 2.b). As noted above, UH does not challenge the trial court's finding that sub-paragraph 2.b of the Restrictive Covenant is overbroad and unenforceable as written. It only urges that the offensive language could be "blue-penciled" as follows:

> **Therefore, the Employee agrees that he will not, during his Employment by the Employer, and for a period of eighteen (18) months thereafter, directly or indirectly,** ~~whether as a proprietor, officer, director, trustee, employee, agent, consultant, or advisor, directly or indirectly, own, manage, operate, control or participate in the ownership, management, operation or control of, or~~ **be** ~~connected in any manner with, any business which shall be~~ **in competition with the type of business engaged in by** ~~the Employer at the time of~~ **the Employee**~~'s termination of his employment~~ **with the Employer.**

Appellant's Reply Br. p. 10-11.

In support of this proposed blue penciling, UH directs us to this Court's opinion in *Smart Corp. v. Grider*. There, the employee, Grider, entered an employment agreement that contained the following clause:

> *Section 4.6--Agreement Not to Compete*. The Employee hereby covenants and agrees that so long as she is either employed by the Company or for the term of this Agreement, and for the lesser of: (i) three (3) years after the Employee ceases to be employed by the Company or any affiliate or successor thereof; or (ii) so long as the Company or any affiliate or successor thereof carries on a like business to that presently conducted by the Company, the Employee will not, in any county of any state in the United States of America where the Company or any affiliate or successor thereof then carries on a like business to that presently conducted by the Company in the County of Los Angeles, California, to the extent permitted by applicable law, ... [compete with Smart][.]

Grider, 650 N.E.2d at 82. Grider's employer, Smart Corp., conceded that the clause was overbroad to the extent that it restricted Grider from operating outside the geographic area of her responsibilities with Smart Corp., that is, outside of Indiana. *Id*. at 83.

However, this Court concluded that "the noncompetition clauses of the Employment Agreement plainly manifest the intention of the parties to protect Smart's legitimate interest in the clients developed and serviced by Grider on Smart's behalf by restricting Grider from appropriating the clients for herself for three years after her termination." *Id*. at 84. We determined that the parties' intention could be enforced by redacting the overbroad geographic restriction from the parties' agreement as follows:

> *Section 4.6--Agreement Not to Compete*. The Employee hereby covenants and agrees that so long as she is either employed by the Company or for the term of this Agreement, and for the lesser of: (i) three (3) years after the Employee ceases to be employed by the Company or any affiliate or successor thereof; or (ii) so long as the Company or any affiliate or successor thereof carries on a like business to that presently conducted by the Company, the Employee will not, ~~in any county of any state in the United States of America where the Company or any affiliate or successor thereof then carries on a like business to that presently conducted by the Company in the County of Los Angeles, California~~, to the extent permitted by applicable law, ... [compete with Smart][.]

Id. In sum, the blue pencil process operated to delete the unreasonable geographic restriction from the contract's noncompetition provisions and left the reasonable restrictions enforceable. *Id*. at 85.

We believe that the blue penciling proposed by UH in this case is significantly different than the blue penciling performed by this Court in *Grider*. This Court in *Grider* simply excised a single clause—the geographic restriction—from the parties' agreement. Here, UH asks us to redact four separate sentence fragments from a single clause. In one instance, UH has spotted a useful word, "be," and saved it from the cutting room floor while conveniently disposing of the terms surrounding it. In another, UH urges us to sever the "'s" from the word "Employee's," thereby leaving the word "Employee." As Defendants note, this would require us to convert a word that originally served as an adjective ("Employee's termination") into a noun ("Employee"). We cannot say that such changes fall within the reach of the blue pencil doctrine.

Indiana's appellate courts have consistently held that application of the blue pencil doctrine is only appropriate where the covenant is clearly separated into divisible parts. *See Dicen v. New Sesco, Inc.*, 839 N.E.2d 684, 687 (Ind. 2005) ("When reviewing covenants not to compete, Indiana courts have historically enforced reasonable restrictions, but struck unreasonable restrictions, *granted they are divisible*.") (emphasis added); *Licocci v. Cardinal Assocs., Inc.*, 445 N.E.2d 556, 551 (Ind. 1993) ("*[I]f the covenant is clearly separated into parts* and some parts are reasonable and others are not, the contract may be held divisible.") (emphasis added); *Burk*, 737 N.E.2d at 811 ("*[I]f a covenant is clearly divisible into parts*, and some parts are reasonable while others are unreasonable, a court may enforce the reasonable portions only.") (emphasis added). This is not such a case. UH is not simply asking us to remove unreasonable parts of a covenant and to retain the reasonable parts. Rather, it is asking us to, among other things, pull an individual word ("be") from the middle of a sentence fragment and to alter the format and meaning of another ("Employee's") in order to turn an unreasonable restriction into a reasonable one. In essence, UH seeks to have us create a reasonable restriction under the guise of interpretation. This we clearly may not do. *See Burk*, 737 N.E.2d at 811. The trial court did not err in granting summary judgment in favor of Taylor on UH's claim for breach of contract.[2]

II. Misappropriation of Trade Secrets

UH next argues that the trial court erred in granting summary judgment in favor of the Defendants on UH's claim for misappropriation of trade secrets. Before reaching the

[2] UH also makes a blue pencil argument regarding the geographic restriction found in the Restrictive Covenant. We need not address this argument, as the overbreadth of the restriction on activities makes the Restrictive Covenant unenforceable regardless of the geographic scope.

issue of misappropriation, we must first determine whether any of the information allegedly misappropriated constitutes trade secrets. A trade secret, as defined by the Indiana Uniform Trade Secrets Act ("IUTSA"), is

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> > (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> >
> > (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ind. Code § 24-2-3-2. Thus, protectable trade secrets have four characteristics: (1) information, (2) which derives independent economic value, (3) is not generally known, or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and (4) the subject of efforts reasonable under the circumstances to maintain its secrecy. *Hydraulic Exch. & Repair, Inc. v. KM Specialty Pumps, Inc.*, 690 N.E.2d 782, 785-86 (Ind. Ct. App. 1998).

"[A] plaintiff who seeks relief for misappropriation of trade secrets must identify the trade secrets and carry the burden of showing they exist." *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 920 (Ind. 1993). As Defendants note, "Whether the parties consider the information at issue proprietary or confidential is of little import, because the question of what constitutes proprietary or trade secret information is a determination for the court to make as a matter of law." *Dicen v. New Sesco, Inc.*, 806 N.E.2d 833, 850 (Ind. Ct. App. 2004), *summ. aff'd*, 839 N.E.2d 684 (Ind. 2005). To allow the parties to re-define what constitutes proprietary or trade secret information would render the IUTSA's definition a nullity. *Id*. at 852. "Such contracts could violate the public policy contained in the IUTSA and render it ineffective." *Id*.

UH first argues that the "purchasing information" of its customers constitutes a trade secret. There are three serious problems with UH's one-paragraph argument in this regard. First, UH generally references "purchasing information" without specifying what information it seeks to protect; it merely mentions such amorphous issues as the costs of "identifying customers and potential customers, visiting or contacting each potential customer and customer, identifying the representative of each such potential customer or customer with authority to propose relationships for uniform purchases, fostering each relationship via marketing, and tracking crucial customer requirements, style, size, color, price, and specific contact information not publicly available." Appellant's Amended Br. p. 21-22. Second, it makes no reference at all to the four characteristics that would make this "information" a protectable trade secret. *See Hydraulic Exch. & Repair, Inc.*, 690 N.E.2d at 785-86. Third, UH directs us to absolutely no designated evidence tending to show that the "purchasing information" of its customers constitutes a trade secret. Rather, it directs us to the argument of counsel at the summary judgment hearing and two affidavits that establish that the "purchasing information" of UH's customers is not included in the "Indiana Health Facilities Directory" or the "Directory of acute care providers." *See* Appellant's Amended App. p. 105-06; 198-201. With this sparse argument, UH has failed to satisfy its burden to show that the purchasing information of its customers constitutes a trade secret. *See Laird*, 622 N.E.2d at 920 (Ind. 1993).

Next, UH contends that the design details of its mobile sales units constitute a trade secret. In this regard, Defendants argue:

> [T]here is no evidence that Taylor at any time had access to any designs or detailed information regarding the structural requirements of the truck. . . . Taylor was not employed by UH at the time of the truck's initial development in 1994. Taylor's knowledge of the truck's design was based solely on personal observation, and his knowledge was thus no more extensive than that which a customer would have acquired when making a purchase.
>
> UH challenges the Trial Court's findings and conclusions as they relate to the mobile scrubs unit, alleging that they do not resolve "whether unique materials and structural design specifications for computer hardware and software for transaction processing, electricity requirements, security requirements, storage space, shelving units and dressing rooms represents a competitive advantage or was readily viewable by customers." However, it has offered no evidence that Taylor was provided or aware of any such specifications or requirements, nor even that such information was maintained by UH itself.

Appellee's Brief of STG p. 20 (internal citations omitted). We must agree. In its reply brief, UH makes no effort to dispute Defendants' contention that Taylor's knowledge of the design details of UH's mobile sales units arose only from his own personal observations. Therefore, we agree with Defendants that "[Taylor's] knowledge was thus no more extensive than that which a customer would have acquired when making a purchase." *Id*. Such information does not constitute a trade secret.

Last, UH asserts that the contact information it has for its vendors and for "medical facility administrators" constitutes a trade secret. It argues:

> Multiple issues of material fact preclude summary judgment on the issue, including whether Mr. Taylor possessed confidential vendor pricing information, the efforts expended by UH to collate unique contact information, whether the medical facility contact information found by the Trial Court to be readily available corresponds in any degree to UH's customer list, the efforts put forth by UH to maintain confidentiality of the

> information, and whether such efforts were reasonable under the circumstances.

Appellant's Amended Br. p. 23. Having so stated, however, UH again fails to direct us to *any* designated evidence tending to create a genuine issue of material fact on this issue. The only relevant citation UH provides is to the argument of counsel at the summary judgment hearing. *See* Appellant's Amended App. p. 102, 105. This is not evidence. *See In re K.H.*, 838 N.E.2d 477, 480 (Ind. Ct. App. 2005). UH has failed to satisfy its burden to show that the contact information it has for its vendors and for medical facility administrators constitutes a trade secret.

UH has failed to show that any of the information to which it refers in its briefs on appeal constitutes trade secrets. Furthermore, as noted above, whether UH considered the information at issue proprietary or confidential "is of little import, because the question of what constitutes proprietary or trade secret information is a determination for the court to make as a matter of law." *Dicen*, 806 N.E.2d at 850. We agree with Defendants that UH seems to seek to prevent competition more than it seeks to protect a trade secret. *See* Appellee's Br. of STG p. 14 (citing *Harvest Life Ins. Co. v. Getche*, 701 N.E.2d 871, 876 (Ind. Ct. App. 1998), *reh'g denied*, *trans. denied*). We cannot say that the trial court erred in granting summary judgment in favor of Defendants on UH's claim for misappropriation of trade secrets.

III. UH's Other Claims

Regarding its claims for tortious interference with business relationships, conversion, and unfair competition, UH has failed to provide any cogent argument on appeal, and the arguments it has made are supported by only cursory citations to authorities and the record on appeal. Therefore, it has waived any argument as to these claims. *See* Ind. Appellate Rule 46(A)(8)(a). Furthermore, to the extent that UH has attempted to develop arguments as to these claims, the arguments depend on the enforceability of the Restrictive Covenant and on the validity of its claim that it held trade secrets. We have already determined that the Restrictive Covenant is unenforceable and that none of the information allegedly misappropriated by Defendants constitutes trade secrets. Therefore, we summarily affirm the trial court's grant of summary judgment in favor of Defendants on UH's remaining claims.[3]

Conclusion

The trial court did not err in granting summary judgment in favor of Defendants on all of UH's claims.

Affirmed.

BAKER, J., and CRONE, J., concur.

[3] Insofar as UH seeks to further develop its arguments on these claims in its reply brief, it has waived these contentions. *See Naville v. Naville*, 818 N.E.2d 552, 553 n.1 (Ind. Ct. App. 2004) ("A party may not raise an argument for the first time in its reply brief."); *see also* Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief."). We do note that we would reach the same result on these claims even if we were to consider the arguments made by UH in its reply brief.